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PUBLIC POLICY AND ECONOMIC POWER: THE AMERICAN ANTITRUST LAWS AND SOME INTERNATIONAL COMPARISONS*

by

Willard F. Mueller**

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** William F. Vilas Research Professor of Agricultural Economics, Professor of Economics, and Professor in the Law School, University of Wisconsin, Madison, Wisconsin, U.S.A.

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Willard F. Mueller**

The market structure of many American food manufacturing and distributing industries confers substantial market power on the leading corporations in these industries. This power has grown in recent decades and promises to grow further in the future. (Mueller and Rogers 1980). In this respect the food industries differ little from many others. Indeed, it is generally acknowledged that in modern capitalistic economies a few hundred corporations have been granted, implicitly if not explicitly, the responsibility for running many important sectors of the economy. Mr. Harold Geneen, longtime head of one of the world's largest corporations, ITT, acknowledges this reality: "Increasingly, the largest corporations have become the primary custodians of making our entire system work."

This economic power often translates into great discretion in corporate social, economic, and political policy. Most visably, it is reflected in the ability to set prices and determine the character and quality of products as well as the expansion and location of manufacturing plants. Large corporation are becoming the major patrons of the arts. Long the chief sponsors of private television and other media, they are rapidly assuming this role for public television as well. 1/ Through their political action committees, corporations are becoming the

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major contributors to persons running for state and national political offices. Studies by Parker and Connor (1978), Marion, et. al. (1979) and Mueller (1982) demonstrate that the corporate custodians of the food manufacturing and distributing industries often possess market power sufficient to impose huge monopoly overcharges on consumers.

In these and other ways the large corporation patterns the socio-economic-political fabric of our entire system. This is tremendous power and inevitably raises questions concerning the legitimacy of the large corporations' custodianship of particular economic sectors.

What is new here is not the presence of actual or potential corporate power. Democratic societies long have recognized the potential conflict between private corporate interests and the public interest. In the U.S., concern with this conflict has waxed and wanned over the past century as the nation has experimented with alternative means of social control of private power. The pendulum has swung between the extremes of laissez faire and direct public ownership and/or extensive regulation of business practices. The result has been a mixed economy that, for the most part, is run by private enterprises operating within a rather complex system of public constraints.

Here I shall address only one area of social control, the American antitrust laws. In addition to summarizing the nature and consequences of these laws, I shall make some comparisons between American laws and those of some other nations.

My comments are restricted mainly to the application of these laws to the food industries; however, application of the laws in food mirrors their application elsewhere. In this summary I shall discuss the nature

and enforcement of the various laws without identifying the particular law or laws involved.

THE AMERICAN ANTITRUST LAWS [2/]

The theory underlying these laws is that by maintaining effectively competitive market structures and market conduct, private enterprises will be compelled to perform in the public interest. The theory assumes that effective competition among business enterprises results in performance that is superior to: (a) private agreements or cartels among private enterprises, (b) government regulated enterprises, or (c) government-owned and managed enterprises. Although all Americans may not agree with these assumptions, the antitrust laws are so deeply imbedded in our legal system that most political debate centers on questions of how best to apply these laws. Explicit departures from these laws are characterized as "exceptions" to them.

The laws are directed at market structure and conduct, not performance as such. They prohibit practices that are thought to be anticompetitive: price fixing and other kinds of cartel-like behavior, price discrimination and predatory conduct, tying arrangements and exclusive dealing, and anticompetitive mergers. Although these prohibitions are aimed primarily at firm conduct rather than market structure, those dealing with mergers and monopolization may be used to restructure an industry.

The laws are particularly intolerant of price fixing. Horizontal and vertical price fixing is illegal *per se*. The current heads of the antitrust agencies are of the view, however, that vertical price fixing is seldom anticompetitive, and they have indicated their intention not to rely on existing legal precedents in this area.

While the law toward mergers has been quite harsh when direct competitors have been involved, it has been extremely tolerant of conglomerate mergers. The law has not proven particularly effective in dealing with firms that have achieved a dominant market position through legal means, and it is becoming increasingly difficult to challenge behavior involving so-called predatory conduct. Finally, the law is largely ineffective in dealing with so-called "shared monopoly," i.e., highly concentrated industries where a few firms possess market power and exercise control over competitive activities through tacit rather than overt collusion. All of these laws have been applied to the food industries.

Enforcement

Under the American system the antitrust laws are enforced by two federal agencies: the Antitrust Division of the Department of Justice and the Federal Trade Commission (FTC). Whereas the Antitrust Division is within the executive branch, the FTC is an independent agency that, in theory, is an arm of the Congress. [3/] In practice, the FTC has come increasingly under the influence of the executive branch. [4/] Nonetheless at times there exist basic philosphical differences between the two agencies. For example, although both agencies have responsibility for enforcing the price discrimination law (discussed below), only the FTC has enforced it in recent decades. The FTC is also often credited, for good or ill, with bringing the most innovative cases, e.g., the major legal precedents regarding conglomerate mergers have been FTC cases. Likewise, only the FTC has challenged "shared" monopoly power (see below).

In addition to the two federal agencies, the American law contemplates enforcement by private parties (where the plaintiff acts as a "private attorney's general") that have been injured by alleged violations of the antitrust laws. In the past two decades the number of private actions has far exceeded those initiated by the federal agencies.

Price Fixing 5/

Cases involving price fixing have been most prominent in local or regional market industries, e.g., baking, fluid milk processing, and in one recent case food retailing. Effective enforcement of these laws often has resulted in enormous savings to consumers. For example, after one price fixing conspiracy among wholesale baking companies was declared illegal, prices fell 15-20 percent below those that had been artifically maintained for an entire decade (Mueller, 1968-1969).

Price Discrimination 6/

This law forbids price discrimination where the effect may be substantially to lessen competition. Many American economists are critical of this law because price discrimination may be used to promote competition in imperfectly competitive markets. Although temporary price discrimination may have this effect, when firms engage in systematic and persistent price discrimination the practice may become a powerful weapon for destroying less powerful, though not necessarily less efficient, competitors.

In the most recent decision (May 1981) involving a government-initiated case (most price discrimination cases are brought by private companies), an Administrative Law Judge of the Federal Trade Commission found the Continental Baking Company guilty of anticompetitive geographic price discrimination. 7/ Not only is Continental the largest

American baking company, but it is a subsidiary of one of the world's largest multinational corporations, International Telephone & Telegraph (ITT). ITT-Continental sold bakery products below cost and incurred huge losses in many metropolitan areas with the effect of destroying or seriously weakening its single-market competitors, even when these competitors were more efficient. During 1971-1975, ITT-Continental lost $5.3 million in the San Francisco area alone. An ITT-Continental manager explained the consequences of these actions: "[W]e are gaining more market domination for our products and as we do so, our competitors fall back, and grow weaker."

In his decision the Administrative Law Judge urged the Federal Trade Commission to consider ordering ITT's divestiture of Continental and the restructuring of Continental into financially autonomous regional bakery units. This is the sort of remedy implied by acknowledging the existence and use of the power ITT enjoyed because it is a huge multiproduct and multinational corporation. Simply put, ITT is a powerful conglomerate enterprise (Mueller 1982). It is highly unlikely, however, that the Commission will accept this recommendation in view of the public statements of its new chairman, James C. Miller III, that conglomerate power poses no problems. In his public statements Chairman Miller has expressed his view that the price discrimination law is anticompetitive and therefore contrary to the public interest.

Despite the federal agencies' lackluster enforcement of the price discrimination law in recent years, considerable numbers of private actions have been brought. As a result there is a good deal less anticompetitive price discrimination in the U.S. than would exist without this

law and, based upon cursory observation, a good deal less than occurs in other market economies.

Merger Law [8/]

Over the past three decades, the merger law has been the most important area of enforcement. Since this law was strengthened in 1950, the antitrust agencies have challenged over 1,500 mergers in nearly 500 individual complaints (Mueller 1980). Of these complaints, about 70 involved food manufacturers and food distributors. As in other industries, most of these cases involved mergers between competitors, although a relatively larger number represented mergers among potential competitors. The high water-mark in strict merger policy was a Supreme Court decision prohibiting a merger between two food retailers that had a combined market share of 7.5 percent in the large Los Angeles metropolitan area. [9/] Although the antitrust authorities currently are not inclined to challenge mergers involving such relatively small market shares, they have not abandoned horizontal merger policy. The first merger action taken by the Justice Department in the current administration was its announcement that if a proposed merger between the third and fourth largest brewers were consummated the merger would be challenged. The brewers had combined shares of 16 percent in the national market, which it apparently viewed as the relevant market.

The strict enforcement of the merger law doubtless has played a major role in preventing increases in market concentration in numerous industries (Mueller 1979). It very probably explains why the average level of market concentration in producer goods manufacturing industries

has remained virtually unchanged over the entire period since World War II (Mueller and Rogers 1980). On the other hand the merger law, as well as the other antitrust laws, have been largely ineffective in preventing the increasing concentration that has been occurring in manufactured consumer goods that lend themselves to advertising-created product differention. These industries have experienced persistent and substantial increases in concentration. More about this shortly.

One of the crucial and as yet not fully charted areas of merger law is that dealing with potential competition. The ultimate dispostion of the recent decision by the Administrative Law Judge of the FTC has enormous implications for the future structure of the food retailing industry, as well as serving as a precedent in other fields. Very briefly, the FTC challenged a merger by the Grand Union Company, a wholly owned subsidiary of Cavenham Limited, an indirect wholly owned subsidiary of Generale Accidentale, S.A., which is ultimately owned by Sir James Goldsmith.[10/] (The fact that Grand Union is part of a huge multinational conglomerate is irrelevant in this case.) Grand Union is one of the leading retail grocery chains in the United States, particularly along the eastern seaboard. In 1979 it acquired Colonial Stores, Inc., a large grocery store chain operating in the southeastern United States. The FTC challenged this merger because it eliminated <u>potential competition</u> between Grand Union and Colonial. After extensive hearings and two years after the complaint was issued, an Administrative Law Judge of the FTC found the merger illegal because it elminiated "Grand Union as a significant actual potential entrant" into Colonial's markets.

This decision will be appealed. Should it be upheld, it would place restraints on mergers among large retail grocery chains, especially if they operate in adjacent geographic areas. If the case is dismissed, large chains will be able to merge with abandon unless they are direct competitors, and even then they probably could purge themselves of a merger complaint by disposing of competing stores in areas of competitive overlap.

Past experience in this industry demonstrates the potential significance of this decision. For the 15-year period 1949-1964, the 10 leading grocery chains accounted for well over one-half of all grocery store acquisitions (measured by sales of acquired units) (Mueller 1980). Then, for the next decade, the industry perceived the FTC's policy as prohibiting virtually all mergers among large grocery chains. During this period, the 10 largest chains accounted for less than 5 percent of all grocery store acquisitions. When certain FTC actions led the industry to believe, in the mid-1970s, that large mergers would not be challenged, the volume of merger activity accelerated to historic highs. Since the Grand Union-Colonial merger was challenged this activity by large chains has once again slowed. The experience with merger enforcement policy in food retailing illustrates graphically how businessmen respond as their perceptions of enforcement policy change.

Based on past experience, one probable resolution of the Grand Union-Colonial matter is that it will be settled with a consent decree before the FTC renders a final decision in the matter. Such a resolution would be unfortunate. Any settlement short of complete divestiture of Colonial would send a signal to business decision makers that the Commission does not intend to act aggressively in this area. The result would be a

further concentration of ownership among the two dozen or so corporations that hold the key to competition in the industry. On the other hand, if the initial decision is upheld it will virtually guarantee that there will remain a fairly substantial number of large chains as potential as well as actual competitors.

The prevention of further merger-induced market concentration in food retailing is particularly important because concentration has been increasing significantly in recent decades. Between 1972 and 1977, alone, the combined market shares of the four largest chains operating in U.S. metropolitan areas rose an average of about 5 percentage points; as a result, in most markets the four largest firms now control nearly 60 percent of the sales. Empirical analysis demonstrates that in such markets grocery retailers have significant market power, and that they use such power to raise prices well above competitive levels (Marion, et. al.).

Monopolization [11/]

Two recent antitrust cases dealt with the possession and use of monopoly power by food manufacturers. The first case challenged single-firm monopoly and the second challenged so-called "shared monopoly."

Not surprisingly, both cases involved industries where product differentiation had been successful in achieving and maintaining mar-ket power. This is significant because the main source of market power in food manufacturing is advertising-created product differentiation.

The ReaLemon Case--In 1976 an Administrative Law Judge (ALJ) of the Federal Trade Commission found the Borden Company, a large multiproduct corporation, guilty of monopolizing the processed lemon juice industry.[12/]

The Federal Trade Commission upheld this decision in 1978 but modified the ALJ's relief.

Evidence of the strength of the ReaLemon brand is that it held up to 90 percent of the market and generally commanded a 40 to 50 percent price premium over brands of equal quality. This is probably one of the greatest price premiums ever enjoyed by a dominant brand in the U.S. food industry. Borden's own documents speak eloquently as to the strength and source of the brand. A Borden marketing plan said that ReaLemon is "one of the greatest brand names in the history of the supermarket." It had, as Borden put it, "an almost imaginary _image_ superiority," despite the fact that "from a technical standpoint ReaLemon has no apparent advantages over the juice of any of its competitors. Processed lemon juice is processed lemon juice..."

The FTC had little difficulty concluding that Borden enjoyed an illegal monopoly: It met the legal test of having power over product price and had the power to exclude competitors. The ALJ had based his decision on Borden's possession of power deriving both from product differentiation and from the use of predatory geographic price and promotional discrimination to destroy competitors. While the Commission found that the ReaLemon brand gave Borden market power, its decision focused particularly on Borden's predatory practices.

This difference in emphasis proved important when it came to remedy. The ALJ remedy called for compulsory licensing of the ReaLemon brand as well as placing some restraints on anticompetitive price and promotional conduct. The Commission, with only its Chairman dissenting, abandoned the ALJ's compulsory licensing as being unnecessarily severe;

it believed a prohibition against predatory pricing and promotion would be sufficient to prevent Borden's use of its monopoly power. It is questionable whether the Commission's prohibitions against predatory conduct will be effective in eroding the monopoly power of the ReaLemon brand.

The Ready-to-Eat Cereal Case--In 1972 the Federal Trade Commission issued a complaint alleging that the leading manufacturers of ready-to-eat (RTE) breakfast cereals monopolized the RTE cereal industry. [13/] This is a novel antitrust case. Whereas the traditional legal standard for monopoly power is the possession of market power by one firm, the suit challenged an alleged "shared monopoly" in the RTE cereal industry.

The FTC's staff argued that a shared monopoly has illegal monopoly power when a few firms (four firms made 91 percent of RTE sales in 1970) control most of the sales in the market and when there are substantial barriers to entry. It introduced economic evidence tending to show that the leading RTE cereal companies excluded entry by, among other things, heavy advertising (12 percent of sales) used to differentiate the firms' products and by engaging in product proliferation. The staff further argued that the industry performed poorly, i.e., consumers were not well served by the shared monopolists: Prices allegedly exceeded competitive levels to such an extent that there resulted a $1 billion overcharge to consumers during the 1970s. Moreover, the industry leaders were not as innovative as the fringe firms.

The defendants argued that the heavy advertising and product proliferation were manifestations of keen competition and that there was no evidence of tacit or overt collusion.

In September 1981, an ALJ agreed with the defendants on virtually all counts and dismissed the case. Whereas on September 21, 1981 the FTC's legal staff asked the Commission to review the case, on November 23, 1981 the recently appointed head of the legal bureau that tried the FTC's case recommended that the case not be appealed, a decision widely believed to reflect the views of the new Commission chairman, James Miller III, who has questioned whether the case should have been brought in the first place. In an unprecedented action, the Commission rejected the bureau director's recommendations and asked for the staff's reasons for not appealing the case. On january 15, 1982, the Commission voted three to one to dismiss the case; the lone dissenter was Commissioner Michael Pertschuk, former Chairman of the Commission.

The disposition of this case reflects the reluctance of the FTC or the courts to use the antitrust laws to deal with product differentiation-created market power. Indeed, it is questionable whether the antitrust laws, even under the best of circumstances, provide an effective means for dealing with this problem which, as noted earlier, is the most common source of market power in the food industries. This raises the question of whether there are alternative means of dealing with the problem.

New Initiatives Toward Advertising [14/]

Over the past two decades the Federal Trade Commission has taken several new initiatives not based on antitrust or the traditional anti-deceptive advertising approach. Times permits only the briefest mention of these, all of which are especially relevant in the advertising of food products.

One approach has been to impose affirmative disclosure requirements on advertisers whereby they must state affirmatively certain characteristics of a product where those characteristics have been demonstrated to be especially important to rational decision making by consumers. For example, the FTC requires petroleum retailers to report the octane rating of the gasoline they sell.

The FTC has long been criticized in advertising cases for its record in winning the war only to lose the peace. The traditional remedy has been to issue cease and desist decrees that merely admonish the guilty to "go and sin no more." This approach may represent a hollow victory where an advertiser is found guilty of deception after having spent millions of dollars for misleading advertising. This is because the effects of past advertising on consumers' preference may go unchallenged unless additional (corrective) information is received. To achieve this result, in a number of cases the Commission has required violating companies to spend money for corrective advertising designed to counter the impressions conveyed by the misleading advertising.

A third approach has involved the substantiation of advertising claims. Beginning in 1971 the FTC issued a resolution requiring all advertisers "to submit, on demand, documentation to support claims regarding the safety, performance, efficiency, quality or comparative price of the product advertised." The essence of this approach is to place a greater affirmative burden on the advertiser making claims for its product.

Another initiative proposed by the FTC and others would require counter-advertising wherein truthful, informative advertising is used to counter the distorting effects of massive advertising efforts that,

while not necessarily untruthful, fail to convey an meaningful information to consumers. The power of counter-advertising was demonstrated when, for a short time, American television stations were required to give free time for counter-advertising of cigarettes. 15/ These advertisements were generally acknowledged to be quite effective in informing consumers of the "truth" about cigarette smoking.

The FTC and others have urged the Federal Communications Commission to require all radio and television stations to make some free time available for counter-advertisements as a way of fulfilling the "public service responsibilities" that the law requires of all media licencees. To date nothing has come of this proposal, although a private consumer publication, Consumer Reports, has sponsored a modest amount of counter-advertising on television.

All of the above approaches have merit, especially counter-advertising. Although none of these approaches has much support from the new head of the FTC, the issues involved will not go away. The power of advertising to create market power and mislead consumers is too great to be left solely in private hands.

Some International Comparisons

Before closing it may be instructive to examine some differences and similiarities in European and U.S. antitrust laws. Although my comparisons are restricted to various merger laws, they reveal several distinct differences between the European and American laws, both as to content and approach. These comments reflect the status of European laws and their enforcement as they existed about two years ago. 16/

I have already discussed briefly the U.S. merger law as it has developed since the enactment of the Celler-Kefauver Act in 1950. It is a very strict law with respect to mergers between direct compet-itors, while being extremely tolerent of conglomerate mergers.

My comments will cover the merger laws of the Federal Republic of Germany, France, the United Kingdom, the European Coal and Steel Community (ECSC), and the European Economic Community (EEC). Although varying in several respects, these laws have some common themes that differ substantially from the U.S. merger law and its enforcement.

The EEC antitrust law is embodied in Articles 85 and 86 of the EEC Treaty. In a 1973 case Article 86 was interpreted as prohibiting mergers that enhance appreciably the domination of an already dominant firm. The potential scope of the law is unclear, however, since no cases have been decided since 1973.

Article 66 of the ECSC Treaty requires premerger authorization of proposed "concentration" when at least one firm is engaged in the production or distribution of coal or steel. The criterion is whether the merger confers the power "to determine price, to control or restrict production or distribution or to prevent the maintenance of effective competition in a substantial part of the market...." In authorizing mergers, the Commission must also consider the size of competing enterprises. In 1977 and 1978, the twenty-four cases examined by the ECSC Commission were authorized. A change in the policy of the Community seems to be reflected in its approval in 1969 of a merger of practically the same coal companies that were prohibited in 1960 from forming a single joint selling organization. This change was authorized because of the growing importance of other forms of energy since the 1950s.

The United Kingdom's merger law, included in the Fair Trading Act of 1973, covers mergers of firms with sales exceeding 5 million pounds sterling that create or intensify a "monopoly," defined as a situation where the combined companies hold a market share of 25 percent or more. In evaluating mergers the Monopolies Commission uses five criteria. Though generally quite broad, most of the criteria are concerned with maintaining or promoting competition. By March 3, 1978, the Commission found thirteen mergers contrary to the public interest and fourteen mergers legal.

In 1977 France enacted its first law covering mergers, the Act to Control Economic Concentration and Prevent Unlawful Cartels and Abuses of Dominant Positions. The law covers unacceptable horizontal mergers where the combined market share is at least 40 percent of domestic consumption and vertical and conglomerate mergers where each firm has a market share of 25 percent of some product. For such a merger to occur the French Competition Commission must determine whether it "makes a sufficient contribution to economic and social progress to compensate for the restraint on competition which it implies." By the end of 1978, no mergers had been considered a threat to competition, though several were still being reviewed.

The Federal Republic of Germany has the most comprehensive European merger law and enforcement program. The law is embodied in sections 23 to 24b of the Act Against Restraints of Competition which requires premerger notification and clearance of large mergers and prohibits mergers that may result in a dominant market position. Market domination

is rebuttably presumed to exist if a single firm with sales of 250 million DM has a market share of 33 percent or more, if two or three firms have a combined share of 50 percent, and if four or five firms have a market share of 67 percent. Mergers creating dominant firms may be justified by a showing that they will improve competitive conditions and that such improvement exceeds the adverse effects of market domination.

The German merger enforcement effort is quite extensive, at least by European standards. Since the beginning of the Merger Control Act of 1973, there have been twenty-three prohibition orders. In seven of these the order became final, in four the Economics Minister granted a public interest exemption, in two cases the orders were rescinded or reversed by the courts, and ten cases are still pending. In twenty-three cases advance notifications were rescinded, partly because of objections raised by the Cartel Office.

Structural as opposed to conduct criteria have been emphasized in defining market domination by the Germans. The Supreme Court's application of structural criteria has established quite clear standards for horizontal mergers: any merger is in peril when the merging firms acquire a 20 percent market share or more in a market with sales exceeding 10 million DM. Conglomerate mergers have been found illegal on grounds of entrenchment and reduction in potential competition. The entrenchment theory, to date, has been limited to firms operating in "proximate" markets.

A common thread running through all the European laws is a concern with the criteria for market dominance as opposed to the American notion of incipient monopoly. In this respect the laws more closely

approximate the standards of the U.S. Sherman Act that deal with monopolization than the standards of the Celler-Kefauver Act that deal with incipient monopoly. The European laws also differ importantly from U.S. law in that most contain a presumption of illegality if the merger results in an industry structure meeting some fairly objective standard of dominance.

Another contrast with U.S. law is that most of the European laws have explicit public interest defenses for a merger. The most recent law, that of France, illustrates the interaction of presumptive illegality and the public interest defense. After identifying dominant firm mergers, the law requires that the French Competition Commission make an explicit finding as to whether a merger's contribution to economic and social progress is sufficient to compensate for its restraint on competition. Such a law gives great discretion to the enforcement officials and courts, much like that enjoyed by U.S. banking agencies in deciding whether mergers are in the public interest.

Such discretion becomes especially important in the context of the European enforcement scheme which contemplates considerably more political involvement in the process than does the U.S. system. It is my understanding that all of the European laws involve a degree of explicit "political" involvement in the initiation of investigations and/or final determination of legality. This is accomplished through the discretion granted appropriate ministers with no or little opportunity to review their decisions. In the United Kingdom the appropriate minister refers mergers to the Monopolies and Mergers Commission; if the latter finds a

merger contrary to the public interest, the minister "may" fashion an appropriate remedy. The French system is quite similar to that of the United Kingdom. While the EEC and ECSC laws provide for judicial procedures, the final decisions are made by the top political body of the Community. Even German merger law gives the economics minister discretion to permit an otherwise illegal merger on public interest grounds, discretion that he has exercised.

This political aspect of these laws differs markedly from the U.S. enforcement scheme. Although the U.S. Attorney General may overrule proposed actions of the Antitrust Division on public interest grounds, the merger law provides no explicit public interest standard for such action. Moreover, the American laws are further depoliticized because they may be used by private parties affected by an alleged violation. However, the current administration has announced that it intends to intervene in behalf of defendants in private cases when, in the Justice Department's judgment, existing laws are "wrong," particularly in the area of vertical price fixing and other vertical restraints that are illegal under current judicial precedents. This decision by an executive department to attempt to persuade courts hearing private suits to accept the Department's interpretation of the law represents an unprecedented politicization of the American antitrust laws.

I turn now to a few comments contrasting the apparent scope and impact of European and U.S. enforcement efforts. Direct comparisons are not possible because the European enforcement effort has not been quantified to the same extent as that in the United States. But I believe

European enforcement efforts to date may be summarized as follows: (a) relatively few mergers have been challenged, (b) enforcement has involved almost entirely horizontal mergers, and (c) challenged mergers have nearly always involved firms with substantial market shares.

The small volume of cases partly reflects the relative newness of the European laws. As indicated, the most ambitious European enforcement effort has been by Germany which has prohibited twenty-three mergers since the passage of its 1973 act. In contrast, since enactment of the Celler-Kefauver Act of 1950, U.S. antitrust agencies have brought about 500 cases challenging over 1,500 mergers.

Although both American and European laws have aimed primarily at horizontal mergers, there is a large difference in the standards used in judging the probable competitive effects of such mergers. Whereas the European laws use market dominance as their touchstone, American law emphasizes incipient monopoly. This is not merely a matter of semantics. The authors of the American law made it manifestly clear that the test was not dominance but a tendency toward monopoly. The antitrust agencies and the Supreme Court have generally been faithful to this intent, despite a growing clamor among some that the standard has resulted in overzealous enforcement.

This difference reflects a fundamental divergence in public policy. European merger laws seem aimed mainly at preventing merger-created monopoly, whereas American law is aimed at preventing highly concentrated oligopolies.

Neither American nor European laws have influenced significantly the growing "super" or "aggregate" industrial concentration resulting

from the huge conglomerate merger waves of the 1960s, 1970s, and early 1980s. Although American law clearly covers potentially anticompetitive conglomerate mergers, its outer boundaries have not been fully explored and the present administration has repeatedly said it does not intend to challenge conglomerate mergers.

In conclusion, there is much to be learned from a comparison of U.S. and various European merger laws and their enforcement procedures. Students of American merger law should especially examine the public interest defenses commonly found in European law. American "antitrusters" often are intolerant of such defenses, arguing that competition is the only appropriate standard. This is nonsense. Matters relating to a merger's impact on communities, employment, and trade may well transcend in importance the purely competitive effects of a merger. It would be well that American antitrust experts learn from European experience more about the procedures used in weighing these matters. Such defenses would become particularly relevant if legislation were enacted declaring certain types of large conglomerate mergers presumptively illegal.

Insofar as European food corporations have market power they probably have somewhat less to fear from the antitrust laws than do their U.S. counterparts. Although the U.S. antitrust laws appear tougher than the European laws I surveyed, the effect of this difference on performance may not be all that great. First, the U.S. laws have not been an unqualified success, particularly in the food manufacturing industries. Second, the various European nations may have developed superior alternative methods of social control of private economic power, e.g. consumer cooperatives, price controls, and other government

regulations. My ignorance of public policy and economic performance of other nations' food systems is too vast to permit my making a judgment as to which nations are most effectively ensuring that their systems work in the long-run best interests of all of their citizens. Perhaps this conference will advance our knowledge on this subject.

NOTES

1/ In a representative month in 1981, 72 percent of all the shows PBS telecast during prime time were funded wholly or in major part by four oil corporations. John Weisman, "Why Big Oil Loves Public TV," TV Guide, June 20, 1981, p. 5.

2/ There are three major antitrust statutes: The Sherman Act of 1890, the Clayton Act of 1914 and the Federal Trade Commission Act of 1914. The Sherman Act of 1890. Section 1 of the Act declares illegal every contract, combination, or conspiracy in restraint of trade. Section 2 of the Act prohibits monopolization, attempts to monopolize or combinations or conspiracies to monopolize. This Act is enforced by the Antitrust Division of the Department of Justice. Private parties may bring suits under the Act and receive damages equal to three times the injuries incurred as a result of a violation of the Act.

The Clayton Act of 1914 as amended by the Robinson-Patman Act of 1936 and the Celler-Kefauver Act of 1950. Section 2 of the act (the Robinson-Patman Act) prohibits discrimination in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly. The law does not prohibit price differences that reflect differences in manufacturing costs or delivery costs. A party that practices price discrimination may justify the practice by a showing that its low price was made in good faith to meet an equally low price of a competitor.

Section 3 of the Clayton Act prohibits tying arrangements.

Section 7 of the Clayton Act (the Celler-Kefauver Act of 1950) prohibits any merger where the effect may be substantially to lessen competition or to tend to create a monopoly.

Section 8 of the Clayton Act prohibits interlocking directors among firms that are competitors of one another.

The Antitrust Division and the Federal Trade Commission share the responsibility of enforcing the Clayton Act. Private parties may bring suits under the Act and receive damages equal to three times the injury incurred as a result of a violation of the Act.

Section 5 of the Federal Trade Commission Act of 1914 prohibits "unfair" methods of competition and unfair or deceptive acts or practices. This broadly constructed statute has been interpreted to cover virtually all

of the prohibitions covered by the Sherman and Clayton Acts. Congress designed the Act broadly so that the Federal Trade Commission could cover anticompetitive practices that were not understood or contemplated when the Sherman and Clayton Acts were enacted. In practice the Act has gone somewhat beyond the earlier statutes. This Act is enforced only by the Federal Trade Commission. Private parties cannot enforce the Act.

3/ The FTC has five commissioners that are appointed by the President and confirmed by the Senate; they serve for seven year terms. The chairman of the FTC is appointed by the President from among the five Commissioners.

4/ For example, its budget must be approved by the President's Office of Management and Budget and congressional testimony of commissioners must be "cleared" by the executive office.

5/ Price fixing cases may be brought under either the section 1 of the Sherman Act or section 5 of the Federal Trade Commission Act. See note 1.

6/ Price discrimination is prohibited by the Robinson-Patman Act. See note 1.

7/ In the Matter of International Telephone & Telegraph Corporation, Federal Trade Commission Docket No. 900, Initial Decision, May 1, 1981.

8/ Mergers are covered by the Celler-Kefauver Act of 1950. See note 1.

9/ United States v. Von's Grocery Co. 384 U.S. 270 (1966).

10/ In the Matter of The Grand Union Company, et. al., Federal Trade Commission Docket No. 9121, Initial Decision, October 30, 1981.

11/ Monopolization is prohibited by section 2 of the Sherman Act. See note 1.

12/ In the matter of the Borden Company, Federal Trade Commission Docket No. 8978, Initial Decision 1976 and Commission Decision 1978.

13/ In the matter of the Kellogg Company, et. al., Federal Trade Commission Docket No. 8883 (1981).

14/ The Federal Trade Commission derives its power to prohibit deceptive advertising under section 5 of the Federal Trade Commission Act. See note 1.

15/ The FCC permitted this counter advertising under its so-called "equal time" rule. When the Congress prohibited cigarette companies from using electronic media advertising the counter advertising ceased.

16/ The following is taken largely from W. F. Mueller "Commentary," in Oscar Schachter and Robert Hellawell (ed.), Competition in International Business (New York: Columbia University Press, 1981),

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